

# **Working with American Indian Communities**

## **Regional Community Impact Assessment Workshop**

### **Phoenix 2005**



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# **Federal Agencies and Tribal Consultation**

**David Ruppert**  
**National Park Service**



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## **Part 1**

# **Native America: Indian Country**



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#### Some Facts

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4.3 million - American Indian Peoples (mixed)

2.5 million - American Indian Peoples (no mix)

500+ - Federally Recognized Tribes

275 - Number of Indian Land Areas

56.2 million - Acres held in trust for tribes.

3.1 million - Claim Tribal Membership

540,000 - Live on reservation or trust lands



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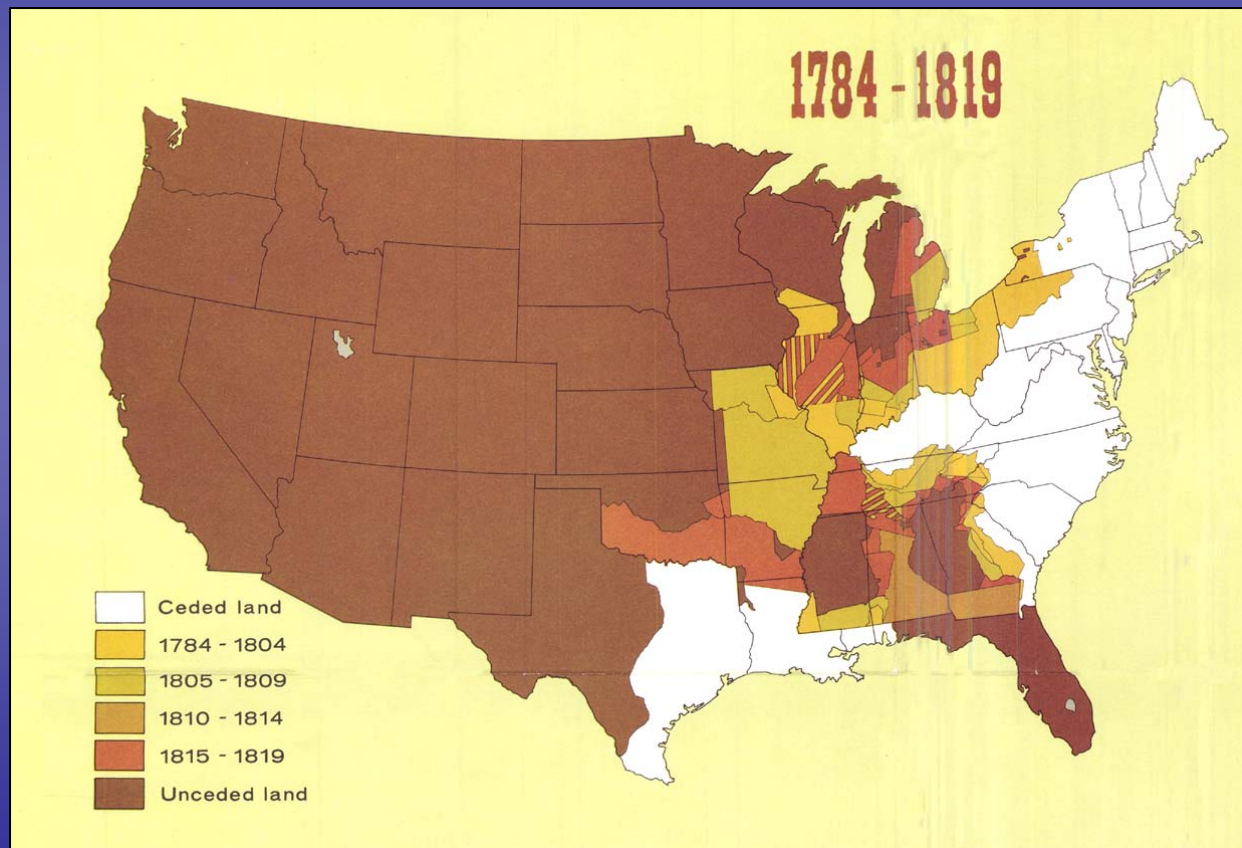
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Indian Population Prior to 1492:  
2 million or 111 million?





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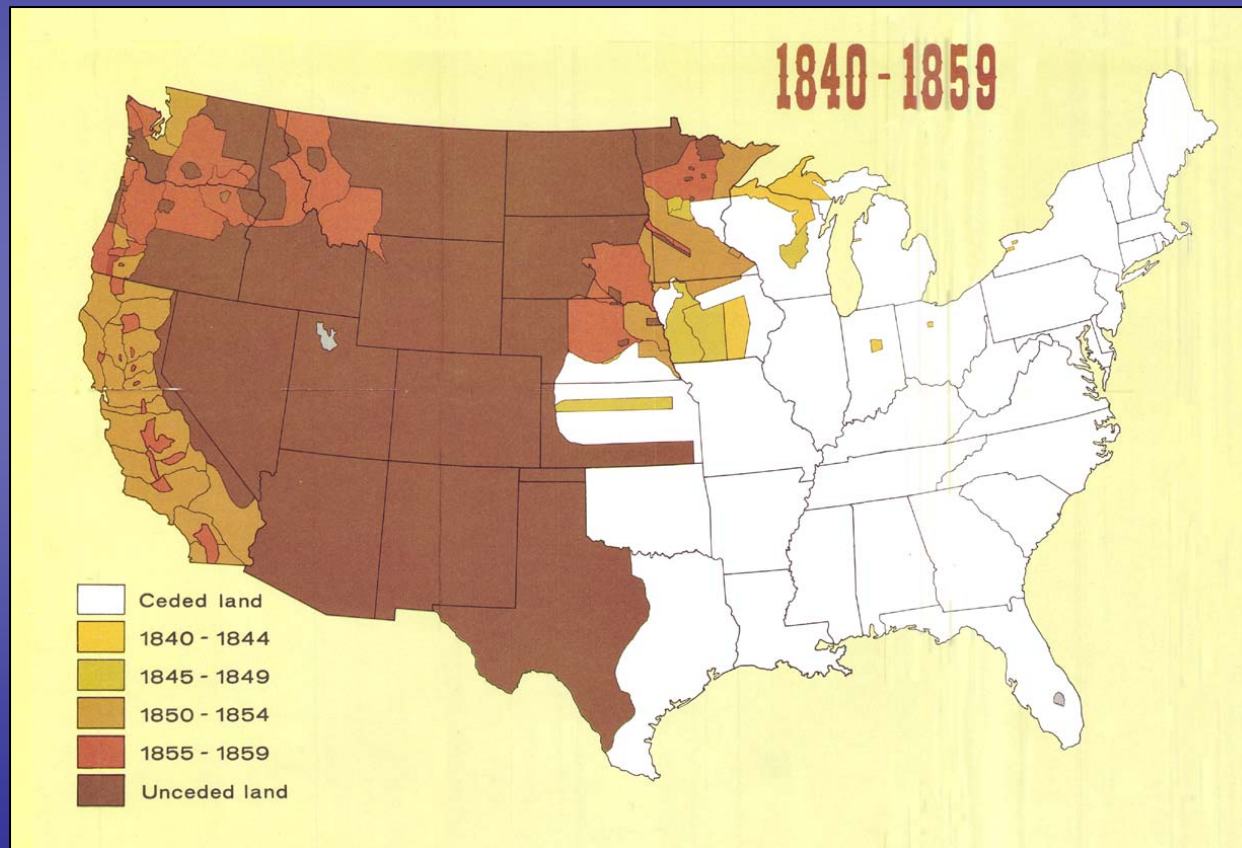
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## Status of Land Cessions by 1859





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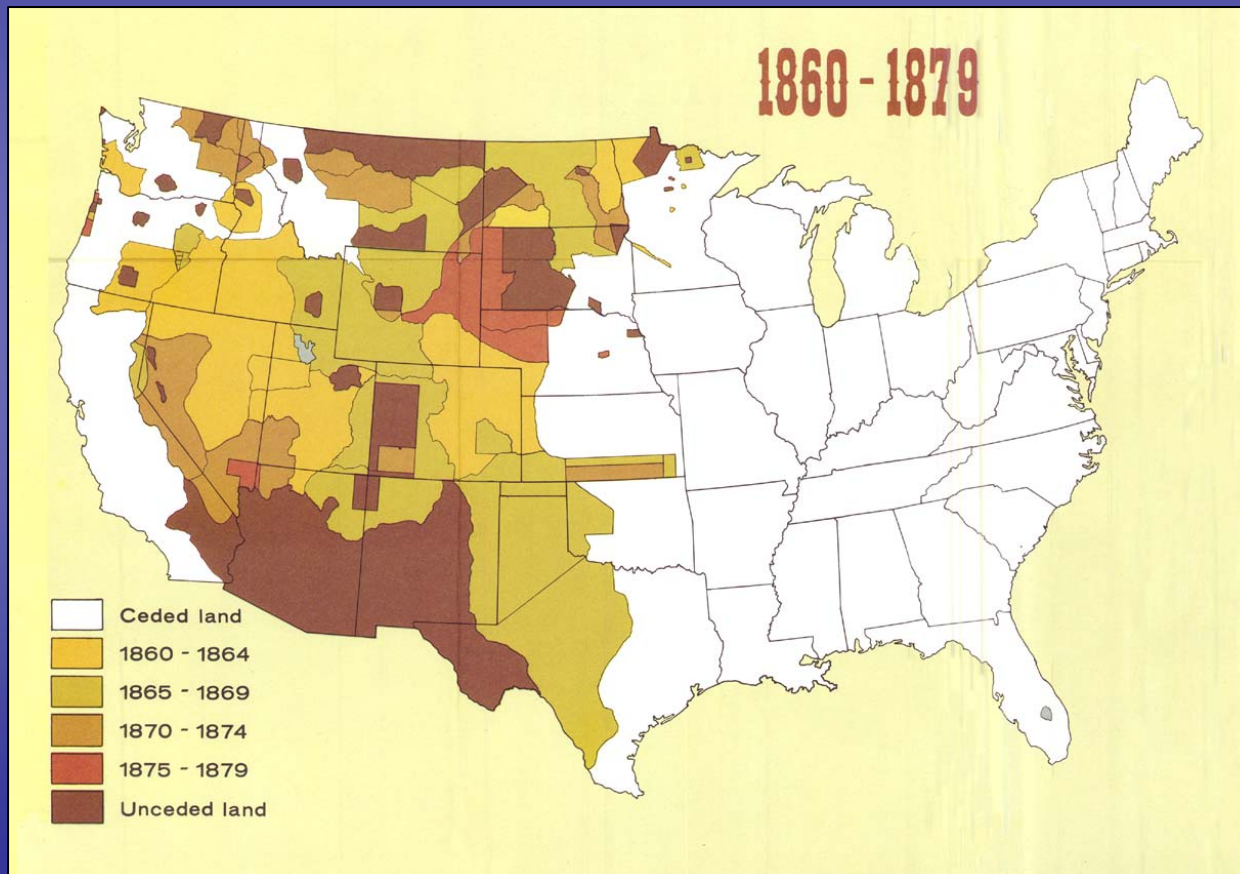
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## Status of Land Cessions by 1879





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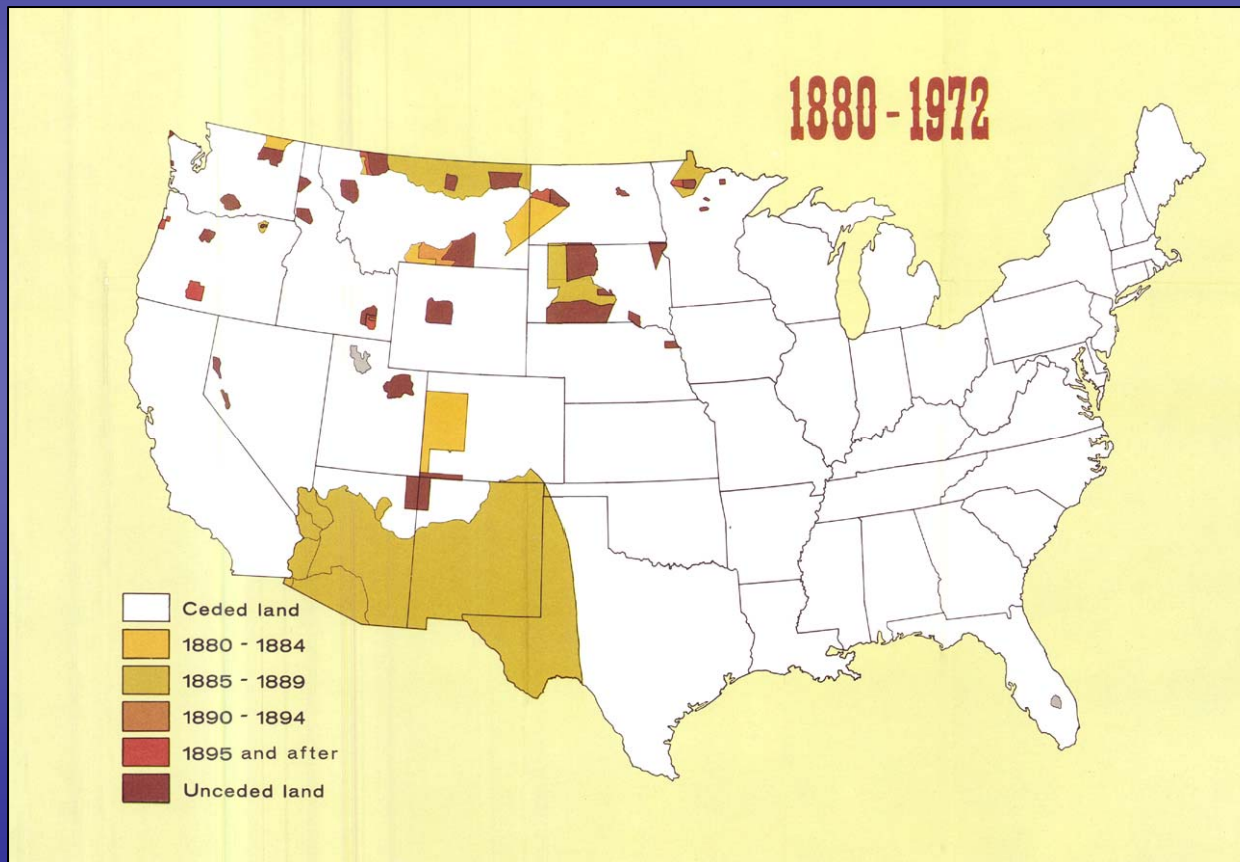
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## Status of Land Cessions by 1972





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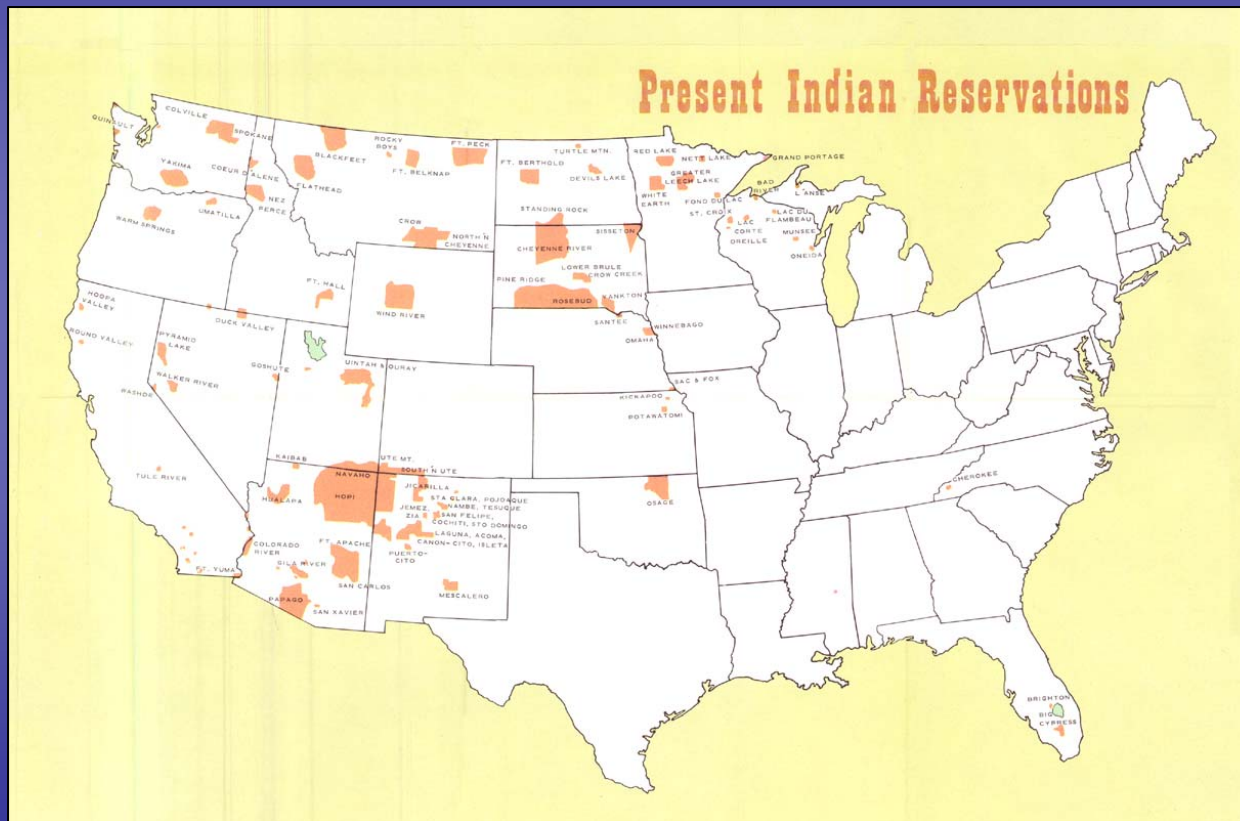
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## Locations of Present Indian Reservations

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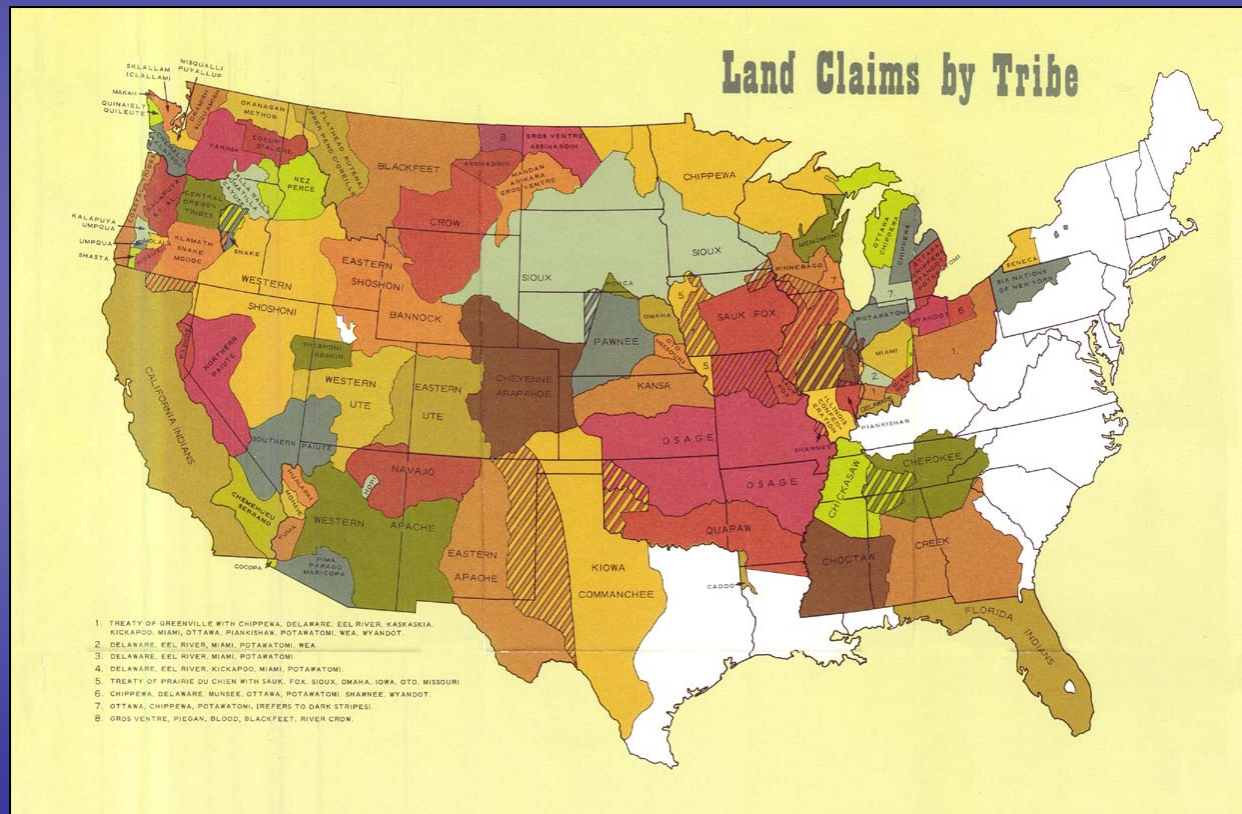
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## Indian Land Claims - 1965





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**Lesson 1:** Indian nations maintain a persistent and vital interest in lands that are still considered ancestral homelands.

**Lesson 2:** Many of these lands may be lands impacts by road construction or other ground disturbing activities



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## **Part 2**

# **Federal Government, and Tribal Sovereignty**





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## Treaties with Indian Tribes

- European powers recognized Indian tribes as sovereign nations and entered into treaties to facilitate land use and peaceful relations
- The United States continued this tradition of treaty-making with Indian nations until 1871.





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## Treaties with Indian Tribes

- Between 1778 to 1871, the United States ratified 380 treaties (out of over 800) with Indian tribes.
- In 1871 Congress ended treaty-making with tribes. Executive agreements replace treaties.

#### AGREEMENT WITH PUYALLUP INDIANS.

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intoxicating liquors of any kind shall be brought within the limits of said reservation by any of the employes of said E. R. co., or be allowed to be used within said limits by any of its laborers, and that after the completion of said branch line no intoxicating liquors of any kind shall be taken out of the cars within the limits of said reservation to be delivered to Indians or be allowed to be used within said limits by persons engaged in operating or keeping said line in repair.

5th. That during the construction of said branch line through said reservation no drunken, disorderly, or grossly immoral men shall be employed as laborers by said co., nor shall such men be brought and permitted by said co. to stop within the limits of said reservation for any purpose that is within the control of said co., nor shall such men after the completion of said branch line be employed within the limits of said reservation in operating or in keeping said line in repair.

6th. That a plain, palpable violation of any of the foregoing stipulations shall at the discretion of the Indians annul and work a withdrawal of their consent to the granting of said right of way.

In consideration of the agreement of said Sprague to the stipulations aforesaid, the said Milroy on behalf of said Indians hereby agrees and binds himself to assemble them in council without delay and to obtain from them through their chiefs and headmen their written consent to the permanent right of way for said branch line through said reservation. In case said consent is not fully obtained as aforesaid, this agreement to be null and void; else to be in full force and virtue in law, as witness our hands at New Tacoma, Wash. Terr., this 21st of November, A. D. 1876.

THE NORTHERN PACIFIC RAILROAD CO.,

By J. W. SPRAGUE, Genl. Supt.  
R. H. MILROY, Agt. in Charge.

DEPARTMENT OF THE INTERIOR,  
Office Indian Affairs, Dec. 14, 1876.



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## The Marshall Trilogy

Three 19<sup>th</sup> Century Supreme Court cases  
that defined the character of the federal –  
tribal relationship

- **Johnson v. M'Intosh 1823**
- **Cherokee Nation v. Georgia 1831**
- **Worcester v. Georgia 1832**



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## Summary

- **Trust Relationship:** Tribes not foreign nations, but “domestic, dependent nations.” U.S. is “trustee” of Indian affairs.
- **Reserved Rights Doctrine:** Tribes are not granted rights by treaty, they give up only what is stated in the agreement.
- **Canons of Construction:** Treaties interpreted as they would have been understood by the tribes at the time of signing. Ambiguities construed in favor of the tribes.



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- Tribes remain sovereign nations and possess self-government.
- Tribes have a nation-to-nation relationship with the U.S. government.
- Only Congress has plenary (overriding) power over Indian affairs.
- State governance is generally not permitted within reservations.



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## Doctrine of Tribal Sovereignty

“Perhaps the most basic principle of all Indian law . . . is the principle that those powers lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.”

**- Felix S. Cohen (1942)**



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## **Part 3**

# **Laws, Regulations, and Executive Orders**



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## National Environmental Policy Act (NEPA) of 1969 (P.L. 91-190; 42 U.S.C.4371 *et. seq.*)

Directs federal agencies to:

- **Consult** early with American Indian tribes concerning planned actions by private applicants or other non-federal agencies
- Invite tribes to participate in the project scoping process (**consult**) and those possible conflicts between the proposed project and tribal land use plans, policies,
- Request tribal comments on draft Environmental Impact Statements and to notify tribes of proposed projects of local concern. And
- Authorizes Indian tribes to be cooperating agencies in NEPA compliance.



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## National Historic Preservation Act (NHPA) of 1966, (P.L. 89-665; 16 U.S.C. 470 *et seq.*) (§) 106

### Requires Agencies to:

- Review federally funded projects for their affect on cultural properties.
- **Consult** with tribes if there may be an affect on cultural properties
- **Consult** with tribes when preservation activities are planned.
- Conduct preliminary ethnographic or ethno-historic research to make any determination of effect.

**Guidance: *National Register Bulletin 38:***  
***Traditional Cultural Property***



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## **American Indian Religious Freedom Act (AIRFA) 1978**

### **(P.L. 95-431)**

- Recognizes the constitutional right of all U.S. citizens (including American Indians) to practice their respective religions.
- It is the “policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions...including but not limited to access to sites, use and possession of sacred objects...”.



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## Native American Graves Protection and Repatriation Act 1990 (P.L. 101-601)

- **Consult** with tribes regarding the repatriation of human remains, funerary objects, sacred objects and objects of cultural patrimony as defined by NAGPRA.
- The statute also outlines requirements for inadvertent discoveries of American Indian grave sites including a cease of all activity at that site for 30 days following an inadvertent discovery to allow **consultation** with affiliated tribes to take place regarding the protection or re-interment of the remains.



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#### Executive Order 13007, “Sacred Sites” 1996 (All federal agencies)

- Requires agency to “(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.

#### Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments” 1993 (DOI only)

- Reinforces the responsibility of all Interior agencies toward the protection of trust resources of all federally recognized tribes and directs Interior agencies to operate within a government-to-government relationship with Indian tribes on all matters dealing with trust resources.



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## Executive Order 12898, “Environmental Justice” 1994 (All federal agencies)

All federal agencies to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States...”. The order specifically addresses the need for agencies to collect, maintain, and analyze information on the consumptive patterns of populations relying principally on fish and/or wildlife for subsistence. Details of tribal involvement in the execution of this order will be determined after consultation with federally recognized tribes.



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## **Part 4**

# **Tribal Consultation**



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## When to Consult?

- Projects involving federal funding.
- Potential disturbance of property of interest to affiliated tribes.
- When there are inadvertent discoveries.
- When requested by tribe(s).



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## Preliminary Information Gathering

- Identify tribes that have potential affiliation.
- Identify tribal officials to contact.
- Research and document existing information on cultural properties.



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## **Consultation Planning**

- 1. Describe purpose and need for consultation.**
- 2. Describe consultation methods to be used.**
  - Letter of notification**
  - Telephone follow-up**
  - Meetings**
    - Initial Meeting**
    - Periodic Meetings**
- 3. Consultation Agreement**



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## **Consultation Planning**

**4. Consultation Working group**

**5. Consultation Schedule**

**6. Cost Estimates**

**7. Coordination with other agencies, offices.**



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## **Consultation Principles**

- **Direct government-to-government relationships are desired and maintained;**
- **Agency fully considers tribal concerns and issues – including issues of confidentiality - in decision-making.**
- **American Indian tribes are involved in decision-making processes to the same extent as other federal, state, or local government units;**



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## **Consultation Principles**

- **American Indian tribes are encouraged and given the opportunity to express their concerns and needs relative to project impact assessment, planning, and implementation;**
- **Resource information is open and accessible to American Indian tribes, including environmental, social, and economic information about a proposed action and its probable effects.**



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# Questions and Discussion